

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
KAISER ALUMINUM AND CHEMICAL
CORPORATION,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 1074

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of a \$250 civil penalty for alleged excessive emission and a \$250 civil penalty for allegedly causing or allowing alumina ore dust to become airborne having come on regularly for formal hearing on the 10th day of February, 1977 and continued on the 16th day of March, 1977 in Lacey, Washington, and appellant Kaiser Aluminum and Chemical Corporation appearing through its attorney, Edward M. Lane, and respondent Puget Sound Air Pollution Control Agency appearing through its attorney, Keith D. McGoffin, and the Board having considered the sworn testimony, exhibits, records and file herein and

1 having entered on the 30th day of March, 1977, its proposed Findings of
2 Fact, Conclusions of Law and Order, and the Board having served said
3 proposed Findings, Conclusions and Order upon all parties herein by
4 certified mail, return receipt requested and twenty days having elapsed
5 from said service; and

6 The Board have considered exceptions from appellant and respondent
7 reply thereto to its proposed Findings of Fact, Conclusions of Law and
8 Order, and having denied said exceptions, now therefore,

9 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed
10 Findings of Fact, Conclusions of Law and Order dated the 30th day of
11 March, 1977, and incorporated by reference herein and attached hereto
12 as Exhibit A, are adopted and hereby entered as the Board's Final
13 Findings of Fact, Conclusions of Law and Order herein.

14 DONE at Lacey, Washington, this 23^d day of May, 1977

15 POLLUTION CONTROL HEARINGS BOARD

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17 W. A. GISSBERG, Chairman

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19 CHRIS SMITH, Member

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26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

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CONTROL AGENCY,)
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FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of two civil penalties (\$250.00) assessed against Appellant for allegedly violating Regulation I, Section 9.03(b) and Regulation I, Section 9.15(a), came on for formal hearing before the Pollution Control Hearings Board (W. A. Gissberg, presiding, and Chris Smith) in Lacey, Washington on February 10, 1977 and continued on Wednesday, March 16, 1977.

Edward M. Lane appeared for Appellant Kaiser Aluminum and Chemical Corporation; respondent Puget Sound Air Pollution Control Agency (PSAPCA) was represented by its attorney, Keith D. McGoffin.

EXHIBIT A

1 Having heard the testimony, having examined the exhibits, having
2 reviewed the trial memorandum of Appellant, the Pollution Control Hearings
3 Board makes these

4 FINDINGS OF FACT

5 I.

6 Pursuant to RCW 43.21B.260, respondent has filed a certified copy
7 of its Regulation I and amendments thereto, which we notice.

8 II.

9 On August 11, 1976 respondent's inspector on routine patrol of
10 Appellant's load-out facility at Pier 7 on the Tacoma Tideflats,
11 observed a "solid column" of alumina escaping from a vent of storage
12 dome two. From a vantage of seventy-five feet from the dome, the inspector
13 also observed a residual haze or plume borne downwind from the descending
14 column. A visual reading of the plume was taken at fifteen second
15 intervals against the backdrop of the dome. For a period of seven minutes
16 the plume had an opacity of 80% one foot from the column diminishing to
17 40% opacity thirty feet from the column. As the haze moved further away
18 from the column it became undetectable to the eye while still upon
19 Appellant's property.

20 III.

21 The plume emanating from the column was composed of alumina
22 particulates and did not consist of uncombined water. Alumina ore dust
23 is capable of and did become airborne and some particles are small enough
24 to and did become suspended in the ambient air.

25 IV.

26 A notice of violation was issued and a civil penalty (No. 2936) of

27 FINDINGS OF FACT,
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1 \$250 was imposed by PSAPCA on August 18, 1976 for violation of its
2 Regulation I. Section 9.03(b).¹

3 Appellant was unaware that any vents were leaking prior to being
4 so informed by the Puget Sound Air Pollution Control Agency inspector.

5 V.

6 On August 12, 1976, PSAPCA's inspector again observed emissions of
7 alumina from storage dome two of Appellant's load-out facility on the
8 Tacoma Tideflats. In this instance, however, the emissions from two of
9 the dome's vents were "frequent but intermittent" and did not violate
10 the specific standards established in Regulation I, Section 9.03(b).

11 The inspector therefore cited the Appellant for violating
12 Regulation I, Section 9.15(a):

13 . . . It shall be unlawful for any person to
14 cause or permit particulate matter to be
15 handled, transported or stored without taking
reasonable precautions to prevent the particulate
matter from becoming airborne. . . .

16 In the inspector's opinion, the extent of the emission itself,
17 i.e., an intermittent plume of 35-50% opacity which dissipated within
18 15 feet, demonstrated that reasonable precautions were not being taken.

19 Appellant was not aware that any vents were leaking until being
20

21 1. Section 9.03(b) provides:

22 . . . After July 1, 1975, it shall be unlawful for any person
23 to cause or allow the emission of any air contaminant for a period or
periods aggregating more than three (3) minutes in any one hour, which is:

24 (1) Darker in shade than that designated as No. 1 (20% density)
on the Ringelmann Chart, as published by the United States Bureau of
Mines; or

25 (2) Of such opacity as to obscure an observer's view to a
26 degree equal to or greater than does smoke described in Subsection 9.03(b)
(1); . . .

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1 so informed by PSAPCA following the alleged violation.

2 Notice of Civil Penalty No. 2940 in the amount of \$250 was issued
3 on August 31, 1976.

4 VI.

5 At the time the emissions were observed, alumina was being
6 loaded from the dock, through the facility's closed conveyor belt
7 system, and into the top of storage dome two. During loading, all the
8 ore passes through the system over dome one with some continuing through
9 the extended belt into storage dome two.

10 The conveyor system is equipped with dust catchers along the
11 conveyor system line, and is also equipped with a dust catcher at the
12 top of the dome where the alumina is dropped into the facility.

13 Twelve vents, equipped with baffles and screens, are spaced around
14 the circumference of the dome approximately 18 feet from ground level.
15 The vents are used to permit air to escape during loading, thus avoiding
16 the buildup of hazardous pressure in the storage dome. All of the vents
17 were closed but not covered during the loading operation.

18 It is estimated that on August 12, 25-30,000 tons of ore had
19 been loaded into dome two which has a capacity of 100,000 tons.

20 VII.

21 In 1974, in response to problems with dust emissions from storage
22 dome one, Appellant "boarded up" three vents adjacent to the dome one
23 discharge area and installed filter bags over several other vents of
24 dome one. No subsequent problems with emissions have been reported
25 from dome one.

26 The vents of dome one and dome two are similar but since Appellant
27 has never had prior emission problems from dome two vents, no covers

FINDINGS OF FACT,

S F No 9928-A

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1 or filter bags were placed on dome two vents.

2 VIII.

3 The manner of discharging the ore into dome one creates a more
4 substantial dust problem than that resulting in storage dome two, thus
5 prompting more preventive devices in dome one. Although Appellant is
6 now experimenting with three different filter bag covers, it does not
7 yet have a cover which would be effective in completely eliminating
8 emissions while permitting an adequate amount of air to escape through
9 the vent.

10 IX.

11 Any Conclusion of Law hereinafter stated which is deemed to be
12 a Finding of Fact is adopted herewith as such.

13 From these Findings, the Pollution Control Hearings Board comes
14 to these

15 CONCLUSIONS OF LAW

16 I.

17 Appellant asserts that the omission of the word "knowingly" from
18 Section 9.03(b) and Section 9.15(a) of Regulation I is an unlawful
19 extension of the statutory standards set forth in RCW 70.94.040.²
20 However, the statutory provision is not a "standard" in itself which
21 can be violated, but is an enforcement provision of the Act "or of

22 _____

23 2. RCW 70.94.040 provides:

24 "Except where specified in a variance permit, as provided
25 in RCW 70.94.181, it shall be unlawful for any person knowingly to
26 cause air pollution or knowingly permit it to be caused in violation
of this chapter, or of any ordinance, resolution, rule or regulation
validly promulgated hereunder."

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1 any ordinance, resolution, rule or regulation" which does set a standard

2 There are five enforcement provisions of the Clean Air Act which
3 are found in RCW 70.94.040, 70.94.425, 70.04.430, 70.94.431 and
4 70.94.435. A scienter element, i.e., "knowingly," is present in
5 RCW 70.94.040.³ This statutory provision was enacted in 1957.⁴ A
6 decade later, in 1967, further and different enforcement provisions
7 were added to the Clean Air Act which included restraining orders and
8 injunctions (RCW 70.94.425), assurances (RCW 70.94.435), and certain
9 criminal penalties (RCW 70.94.430).⁵ In 1969 a civil penalty section

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11
12
13 3. Ibid.

14 4. Laws of 1957, ch. 232. The provision was amended in 1967
15 substituting "70.94.181" for "70.94.180" Laws of 1967, ch. 238, § 3.

16 5. The provision was amended in 1973 to read as follows:

17 "Any person who violates any of the provisions of this
18 chapter, or any ordinance, resolution, rule or regulation in force
19 pursuant thereto, other than RCW 70.94.205, shall be guilty of a
20 misdemeanor and upon conviction thereof shall be punished by a fine
of not more than two hundred fifty dollars, or by imprisonment for not
more than ninety days, or by both fine and imprisonment for each
separate violation. Each day upon which such violation occurs shall
constitute a separate violation.

21 "Any person who wilfully violates any of the provisions of
22 this chapter or any ordinance, resolution, rule or regulation in force
23 pursuant thereto shall be guilty of a gross misdemeanor. Each day
upon which such wilful violation occurs shall constitute a separate
offense. Upon conviction the offender shall be punished by a fine of
not less than one hundred dollars for each offense.

24 "Any person who wilfully violates RCW 70.94.205 or any other
25 provision of this act shall be guilty of a gross misdemeanor and upon
26 conviction thereof shall be punished by a fine of not less than one
hundred dollars nor more than one thousand dollars, or by imprisonment
for a term of not more than one year or by both fine and imprisonment."
(Emphasis added.) Laws of 1973, 1st Ex. Sess., ch. 176, § 1.

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1 was added to the enforcement provisions of the Act.⁶ It is important
2 to note the absence of any language such as "wilfully" both in the first
3 paragraph of RCW 70.04.430 (dealing with misdemeanors) and the first
4 paragraph of RCW 70.94.431 (dealing with civil penalties). In viewing
5 RCW 70.94.040, 70.94.430 and 70.94.431, the omission of the "wilful"
6 requirement can leave little doubt of a clear legislative intention to
7 dispense with the scienter requirement for certain violations which
8 include civil penalties. This interpretation is also consistent with
9 the increasing legislative concern for clean air since 1957 as evidenced
10 by the successive provisions added to the Clean Air Act, chapter 70.94
11 RCW.

12 Unlike certain outdoor burnings (RCW 70.94.775), there is no
13 specific statutory provision making it unlawful to cause or allow air
14 contaminant emissions. However, the agency's responsibility and
15 authority for controlling air contaminants and thereby air pollution is
16 pervasive in RCW 70.94. Section 9.03 of respondent's Regulation I
17 promulgated pursuant thereto does render it unlawful for any person to
18 "cause or allow" emissions. Scienter need not be present nor must a
19

20 6. Laws of 1969, 1st Ex. Sess., Ch. 168, § 53.

21 This provision was amended in 1973 to read as follows:

22 "In addition to or as an alternate to any other penalty
23 provided by law, any person who violates any of the provisions of
24 chapter 70.94 RCW or any of the rules and regulations of the department
25 or the board shall incur a penalty in the form of a fine in an amount
26 not to exceed two hundred fifty dollars per day for each violation.
Each such violation shall be a separate and distinct offense, and in
case of a continuing violation, each day's continuance shall be a
separate and distinct violation."

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1 lack of reasonable care be established. Nor must scienter be present
2 under Section 9.15(a) although the test of reasonableness is applied to
3 the precautions employed.

4 The imposition of strict liability under these regulations
5 designed to secure and maintain levels of air quality protective of human
6 health is consistent with the development of the law which imposes strict
7 liability in public welfare offenses.⁷

8 II.

9 Appellant Kaiser Aluminum and Chemical Corporation violated
10 Regulation I, Section 9.03(b) on August 11, 1976. Although conditions
11 of the inspector's observation may not have been optimal, his opacity
12 reading in this instance was in conformance with his certified training
13 and experience and was not shown to be erroneous.

14 It would be error for this Board to evaluate the amount of the
15 instant emission in terms of the tons of ore being loaded and to conclude
16 that from this perspective the emission is insignificant and therefore
17 non-violative of the regulation. PSAPCA is under an obligation to
18 control not only individual major emissions but must also actively seek
19 to control those individual minor emissions which in their cumulative
20 effect pose a very real threat to the environment through contamination
21 of the ambient air.

22
23 7. See 46 A.L. R.3d 758. Cobin v. Pollution Control Board,
24 16 Ill. App.3d 958, 307 N.E.2d 191 (1974); Bath, Inc. v. Pollution
Control Board, 10 Ill. App.3d 507, 294 N.E.2d 778 (1973).

However, as this Board has previously stated,⁸ where wilfulness is not established, the impact of the emission should affect the penalty assessed.

In this regard, it is not clear from the evidence presented what amount of emission not visible to the naked eye remained suspended in the air current and for what length of time. Even assuming that some of the particulates remained suspended and indeed left the Appellant's premises, it is the judgment of the Board that the maximum penalty assessed is excessive.

III.

The emission observed on August 12, 1976 was alumina ore dust which is particulate matter within the meaning of Regulation I, Section 9.15(a) and under Appellant's control. As this Board has consistently held, once a prima facie case of dust being airborne from a facility has been established, the burden of proving that "reasonable precautions" were taken to prevent such an emission shifts to Appellant.

IV.

"Reasonable precautions" are ascertained by the Board within the factual context of the individual case. Considering the absence of reported problems from the vents of dome two for a period of eight years, the documented efforts which have been made to control emissions in the loading system, the very real hazard involved in precluding the escape of air during both loading and unloading, and the experimental

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1 nature of available filter bags for such a purpose, Appellant's failure to
2 install covers and filter bags on all its vents was not unreasonable.
3 Under the circumstances then existing, Appellant was taking reasonable
4 precautions to prevent the particulate matter from becoming airborne.
5 However, now that Appellant is alerted to the problem and PSAPCA's
6 legitimate concern, efforts to develop an effective method of control
7 should be actively pursued. The Board would emphasize that in attempting
8 to meet the requirements of any air pollution control authority,
9 individuals and corporations should seek to achieve the maximum that is
10 reasonable in furtherance of clean air rather than limiting their efforts
11 to the minimum calculated to avoid the imposition of civil penalties.

12 V.

13 Any Finding of Fact herein which is deemed to be a Conclusion of
14 Law is adopted herewith as such.


15 From these Conclusions, the Board enters this


16 ORDER

17 Notice of Violation No. 12413 is affirmed; however, the amount of
18 civil penalty assessed in Notice of Civil Penalty No. 2936 is reduced
19 to \$100; Notice of Civil Penalty No. 2940 is vacated.

20 DATED this 30th day of March, 1977.

21 POLLUTION CONTROL HEARINGS BOARD

22 
23 W. A. GISSBERG, Chairman

24 
25 CHRIS SMITH, Member

26 FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER 10